IN THE

Supreme Court of the United States

No. 450 October Term, 1942

ROBERT L. DOUGLAS, ALBERT R. GUNDECKER, EARL KALLBRENNER, CARROLL CHRISTOPHER, VICTOR SWANSON, NICHOLAS KODA, CHARLES SEDERS, ROBERT LAMBORN AND ROBERT MURDOCK, JR.,

Petitioners

v.

CITY OF JEANNETTE, (Pennsylvania), a municipal corporation, and JOHN M. O'CONNELL, individually and as Mayor of City of Jeannette (Pennsylvania),

Respondents.

ANSWER OF THE CITY OF JEANNETTE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Supreme Court of the United States:

The answer of the City of Jeannette to the petition for writ of certiorari in the above entitled proceeding shows:

(A)

SUMMARY STATEMENT OF MATTERS INVOLVED

1. Preliminary Statement

The assertion of the petitioners that Ordinance No. 60 of the City of Jeannette imposes a tax of $10.00 per day

or $3650.00 per annum is preposterous. The license fee imposed by the ordinance is $1.50 per day for a daily permit and $1.00 a day or less if the canvasser wishes to work on a weekly basis. Ordinance No. 60 of the City of Jeannette is quite similar to the Fort Smith, Arkansas, ordinance which was involved in the case of Bowden et al. v. City of Fort Smith, 314 October Term 1941, in this Court, 62 S. Ct. 1231, except that the latter imposes higher fees. The Fort Smith ordinance imposes a license fee of $2.50 per day, $10.00 per week, and $25.00 per month. The complaint filed in the District Court does not attack the ordinance on the ground that the license fee of $1.50 per day, or $1.00 per day on a weekly basis, is exorbitant or burdensome (R. 16 to 21).

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2. Statement of Facts

This action is brought by the petitioners in the District Court on the theory that the City of Jeannette, under color of Ordinance No. 60, was depriving the petitioners of certain constitutional rights, and that the Civil Rights Act of 1871 (8 U. S. C. A., Section 43), gave them a right of action in such case.[1] They asserted that Section 24 (14) of the Judicial Code (28 U. S. C. A., Section 41 (14)),[2] gave

[1] Section 1979 Revised Statutes is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] Section 24 (14) of the Judicial Code is as follows:

"The district courts shall have original jurisdiction as follows:

the District Court jurisdiction to entertain the action. The complaint asserted generally that the petitioners were being deprived of their rights of freedom of worship, freedom of speech, of press, and of assembly, but did not assert a single fact which showed, or tended to show, a deprivation of any of these rights. The burden of the complaint is that when the petitioners were arrested, they were compelled to undergo the expense of appeals to the Higher Courts (R. 9). There is no assertion anywhere in the bill that the petitioners were at any time denied a fair trial, and no averment that any of their appeals to the higher Courts were sustained. There is no suggestion that the fees charged in the ordinance are arbitrary or burdensome. To apply for a permit, the petitioners say, would be "an insult to Almighty God."

In an effort to sustain their averment that they were put to considerable expense in defending themselves in the several Courts of Pennsylvania and of the United States, (and not for the purpose of showing that the fees under the ordinance were burdensome), the petitioners offered testimony concerning sums of money paid out for legal expense. The testimony shows that not a penny was paid out by any of the petitioners. All legal expenses were paid from the funds of a nonprofit corporation, known as Kingdom Service Association or Kingdom Service Company (R. 69 to 73). The latter was maintained entirely by sub-

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"Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States, providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

scription or contributions. Kingdom Service Association had been ostensibly organized to provide and operate a school for children of members of Jehovah's Witnesses, but its expenditures for legal services far exceeded the sums paid out for the maintenance of schools (R. 106 to 112).

The position of the City of Jeannette and of Mayor O'Connell was that Jehovah's Witnesses were engaging in a commercial enterprise; that each of its so-called solicitors received a profit which ranged all the way from twenty-five per cent. to four hundred per cent. on the sale of literature and books (R. 44); that the provisions of Ordinance No. 60 had been enforced only against members of the group who sold literature from door to door in the City without a license. In this connection, it was shown that solicitors purchased their wares at prices ranging from five to twenty cents per book, and sold them at the uniform price of twenty-five cents (R. 75); that in every instance in which members of Jehovah's Witnesses were arrested, there was testimony which warranted and amply supported the findings that the persons convicted had actually sold books (R. 100 to 106).

The methods employed by Jehovah's Witnesses were identical with those used in ordinary business transactions. Records were kept of receipts and disbursements. The records of the Central Unit, Pittsburgh Company of Jehovah's Witnesses show quite a substantial monthly profit (R. 116 to 118). Ordinary credit methods were employed by the Watch Tower Company, by the several companies of Jehovah's Witnesses, and by the individual solicitors. The petitioners were fond of referring to the sums received, paid out or charged on their books and records as "Contributions", but frequently they dropped this subterfuge, and the record is replete with such terms as

"invoices", "prices", "consignments", "inventory", and "charges" (R. 116 to 120).

The payments shown to have been made for legal services and for expenses were quite liberal. The amount which, according to the testimony of the petitioners, was spent on three pieces of litigation in which the City of Jeannette was concerned was sufficient, if a license fee was obtained in a weekly basis, to have maintained a solicitor in the City of Jeannette every day for a period of almost five years (R. 69). There was thus no averment and no proof that the license fee charged under the ordinance was excessive or burdensome. On the contrary, the record would tend to show that the several companies through which Jehovah's Witnesses do business could quite well afford to pay the modest fee fixed by the ordinance for engaging in business.

(B)

QUESTIONS PRESENTED

(1) The assertion that Ordinance No. 60 of the City of Jeannette imposes a daily tax of $10.00 or an annual tax of $3650 is without any foundation whatsoever. The reasonableness of the license fee of $1.50 per day or $1.00 per day or less on a weekly basis is not asserted in the complaint, and the question was not raised in the District Court, in the Circuit Court, and is not properly before this Court.

(2) This question has been repeatedly ruled upon by this Court.

(3) This question has been repeatedly ruled upon by this Court.

(4) Both the District Court and the Circuit Court decided this question favorably to the petitioners, and they are not in a position to complain about it.

(C)

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied upon by the petitioners, and some of the cases therein cited, are discussed in the respondent's brief accompanying this reply.

FRED B. TRESCHER,
Solicitor for the City of Jeannette.

BRIEF ON BEHALF OF RESPONDENT

The elasticity of conscience displayed by the petitioners in their brief must cause this Court to wonder whether their religious convictions are worthy of the care and attention heretofore given them. In the District Court and in the Circuit Court, the petitioners contended that it would do violence to their consciences to ask for or receive any license under a man-made law. They now, inferentially, say they are willing to apply for a permit but that the rates imposed by the ordinance are excessive and burdensome. This attempt to change their position and to raise in this Court, a question which was not raised in either the pleadings or the proofs, and was not passed upon by either the District Court or the Circuit Court, was, of course, brought about by the decision of this Court in the case of *Bowden et al. v. City of Fort Smith, Arkansas*, 62 S. Ct. 1231, decided June 8th, 1942.

The petitioners, by their pleadings and by their proofs, attempted to show jurisdiction in the Federal Courts on the theory that it was burdensome for them to pay counsel fees to defend actions in the State Courts. They did not contend that the license fees imposed by the ordinance would operate as a substantial clog on their activities. Their testimony showed, or tended to show an expenditure of some Seventeen hundred Dollars principally for attorney fees in connection with litigation with the City of Jeannette. These expenses were not borne by the petitioners but were paid for by a corporation known as the Kingdom Service Association. Kingdom Service Association derives its funds from contributions made to it by so-called companies of Jehovah's Witnesses, which un-

doubtedly, according to the showing in this case, operated at a substantial profit. The fees paid out were more than ample to have kept a reasonable number of solicitors in the City of Jeannette for years.

In *Bowden v. City of Fort Smith, Arkansas*, 62 S. Ct. 1231, this Court pointed out that "If the size of the fees were to be considered, to reach a conclusion one would desire to know the estimated volume, the margin of profit, the solicitor's commission, the expense of policing and other pertinent facts of income and expense." There was no effort to show any of these things with reference to the license fee specified in the ordinance, and the question is consequently not fairly or properly before this Court.

Ordinance No. 60 of the City of Jeannette requires all persons who solicit orders for or deliver merchandise of any kind, to first obtain a license to transact such business. The ordinance was directly before this Court on petition for writ of certiorari in the case of *Stewart v. City of Jeannette*, 309 U. S. 674, 699, and a certiorari was denied. It is the "common type of ordinance requiring some form of registration or license of hawkers or peddlers", to which this Court was referring as a lawful exercise of State power in the case of *Schneider v. Town of Irvington*, 308 U. S. 147. The Irvington ordinance imposed police censorship. The City of Jeannette ordinance gives discretion to no one. Ordinance No. 60 is the type of ordinance to which this Court was alluding to in the Irvington case when it said:

> "We are not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires."

Bowden v. City of Fort Smith, Arkansas, and companion cases at Nos. 280, 314 and 966 October Term, 1941, decided June 8th, 1941; 62 S. Ct. 1231, directly disposes

of the contention that the imposition of a license fee for the privilege of going from door to door and into the homes of residents of the City of Jeannette to sell books and pamphlets is a violation of the petitioners' rights of freedom of speech, of press and of worship. In these cases, as well as in the cases of *Thornton v. State of Alabama*, 310 U. S. 88, 60 S. Ct. 736, and *Carlson v. People of California*, 310 U. S. 106, 60 S. Ct. 746, this Court recognizes the right and duty of the State to enact laws and regulations to protect the privacy and property of its residents. The right of citizens to be secure in their homes from unwanted intrusion is one that is just as fundamental and just as sacred as the right of freedom of conscience, and speech and press.

It may be appropriate to say here that the ordinance of the City of Jeannette does not exact license fees of the petitioners when they sell on the public streets. They are not only free to use the public streets for this purpose, but members of Jehovah's Witnesses actually do vend their wares in this manner without the payment of any sum whatsoever. It is only when they go from door to door, and into the homes that the terms of the ordinance come into operation. From earliest colonial times, itinerant vendors have been subjected to the payment of a reasonable fee for the privilege of engaging in such business. It is a type of business that can be dangerous to the citizens. Jehovah's Witnesses are no exception.

None of the petitioners in this case are residents of Jeannette. Two of them are not even residents of Pennsylvania (R. 3 and 4). In the cases in which complaint is made in the bill, the solicitors were from many distant towns, both inside and outside of Pennsylvania. The card issued by the Watch Tower Bible and Tract Society affords no protection whatever. These cards are appar-

ently given almost indiscriminately to anyone who has the cash or credit to obtain books or tracts from a company of Jehovah's Witnesses (R. 42, 52 and 53). In any event, it would scarcely be contended that a New York corporation or a voluntary company of a religious group can supplant responsible governmental officials in the protection of citizens in their homes.

"The effect of the ordinance would seem to be to subject persons who would otherwise pay no license for the privilege of doing business within the borough, to the duty of paying something for the privilege, when they undertake to exercise it without incurring the expense of a mercantile license. * * * The peddling of 'other articles' besides market produce includes everything which may be disposed of by the method called 'hawking and peddling', and we cannot say that this does not include canvassing from house to house and soliciting orders for books."

Warren Borough v. Geer, 117 Pa. 207, 211, 212 (1887).

"But it is the manner of sale that makes a peddler. * * * The business of the itinerant vendor is the same in either case, and so is the inconvenience and annoyance he inflicts on others. The merchant or storekeeper is a resident, has a fixed place of business, where his goods are shown to those who come in search of what they need, where he can be reached by process, and compelled to make good his guaranty of the quality of his wares. The peddler is a transient, with no fixed place of business, who seeks customers by invading their homes, and makes sales by persuading people to buy what they do not want, and who, by the time he is wanted to answer for his representations and

engagements is out of sight and out of reach of process. * * * Our laws relating to peddling are directed, not against the right of acquisition, but the manner in which he may sell them. Our peddling laws are therefore not in violation of the constitutional rights of the owners of goods, but are a wise exercise of the police power over the manner in which goods, wares, and merchandise shall be sold."

Commonwealth v. Gardner, 133 Pa. 284, 289, 290 (1890).

In a recent case in which the Superior Court of Pennsylvania was called upon to weigh the conflicting right of citizens to be secure in their homes as against the right of Jehovah's Witnesses to barge into their homes to sell books and tracts, President Judge Keller, speaking for the Court, said:

"This appellant is perfectly free to worship God according to the dictates of his own conscience, separately or with his family and co-religionists, in his home or theirs, and in church, chapel, assembly or other gathering place. But the very clause of the Constitution which protects him in his religious worship, protects others from having his religious tenets and beliefs thrust upon them, against their will, in their homes and offices. Now does the right of free speech justify the unwanted intrusion of the speaker into the homes to give voice to his speech. There is a reasonable limit to the right, and it ends at the door of a home whose residents do not want the speaker to enter; just as its protection is lost by blasphemy, disorderly conduct, libel, slander, etc."

Commonwealth v. Palms, 141 Pa. Super. 430, 15 A. 2d, 481, 485.

Insofar as the decisions of Pennsylvania are concerned, this case is ruled by the case of *Pittsburgh v. Buffner*, 134 Pa. Super. 192, 4 A. 2d, 224. Appeal refused by the Supreme Court of Pennsylvania March 17th, 1939. 134 Pa. Super. XXXIII.

Ordinance No. 60 of the City of Jeannette was recently before the Superior Court of Pennsylvania in the case of *Commonwealth of Pennsylvania v. Robert J. Murdock, Jr., et al.*, at Nos. 1 to 8, both inclusive, April Term 1943. The Superior Court, in an opinion filed July 23rd, 1943, again upheld the validity of the ordinance in an opinion by Judge Keller, in which the opinion of this Court in the case of Bowden et al. v. City of Fort Smith, *supra*, is quoted extensively. The Supreme Court of Pennsylvania, in that case, denied a certiorari on September 28th, 1942, and a petition for writ of certiorari to the Superior Court of Pennsylvania has been filed in this Court.

The case of *Commonwealth v. Reid*, 144 Pa. Super. 569, 20 A. 2d, 841, which is cited by petitioners as being in conflict with the decision of the Circuit Court, is one that relates solely to the sale of periodicals on the streets. As previously noted, there is no ordinance of the City of Jeannette which requires the payment of a license fee to sell books or periodicals on the public streets, and Jehovah's Witnesses are free to transact their business in this way in the City of Jeannette to their hearts' content.

Such cases as *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, and *Southern Railway Company v. Greene*, 216 U. S. 400, have no application to the case at bar. The ordinance applies equally to resident and non-resident itinerant solicitors. It makes no distinction between foreign and domestic corporations or between corporations and individuals.

Grosjean v. American Press Company, 297 U. S. 233,

pronounces no such doctrine as the petitioners ascribe to it. On the contrary, it specifically recognizes the right of the State to tax publishing houses and newspaper publishers so long as the tax applies equally to all, and so long as it is not a thinly disguised effort at censorship.

On the question of jurisdiction, the respondents feel strongly that the District Court and the Circuit Court were in error. The Acts of congress under which jurisdiction was sustained [1] [2] gave individuals a right of redress, and gave District Courts a right to entertain actions in law or in equity where constitutional rights are denied under color of a State ordinance or law. The very use of the word "color" involves pretext or disguise. It suggests, window dressing and hypocrisy. To give an indi-

[1] Section 1979 Revised Statutes is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] Section 24 (14) of the Judicial Code is as follows:

"The District courts shall have original jurisdiction as follows:

* * * * * * * * * * *

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States, providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

vidual a right of action, and to give Federal Courts the right to entertain such an action would involve at least a showing that the ordinance was merely a sham and a subterfuge, and that it was being so employed as to deprive individuals of clear constitutional rights. Certainly, this requirement is not satisfied by a general averment in a pleading that there is want of due process. Any person who seeks to invoke the jurisdiction of the Federal Courts could do so by making such an allegation. Judge Jones, in his dissenting opinion on the question of jurisdiction, clearly and forcefully sets forth the views of the respondents on this question, and it would be presumptious on the part of counsel to attempt to add to that discussion.

Hague v. Committee for Industrial Relations, 307 U. S. 496, in the opinion of counsel for the respondents, is the guide post that marks the limits of Federal jurisdiction under Section 24 (14) of the Judicial Code, (28 U. S. C. A., Section 41 (14)), of a cause of action under R. S. Section 1979, 8 U. S. C. A., Section 43.

The petitioners, however, have not been harmed by the decision of the District and Circuit Courts on this point, and it affords them no basis for asking for a writ of certiorari.

The respondents respectfully ask that the petition be dismissed.

FRED B. TRESCHER,
Solicitor for the City of Jeannette.